INDEX

CASES CITED

IN THE BRIEF

40512—25——1

IN THE APPENDIX

STATUTES CITED

IN THE BRIEF

TREATIES CITED

IN THE BRIEF

IN THE APPENDIX

OTHER CITATIONS

IN THE BRIEF

IN THE APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1924

CHEUNG SUM SHEE ET AL., APPELLANTS
v.
JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO, APPELLEE
No. 769

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF ON BEHALF OF THE APPELLEE

STATEMENT

The appellants in this case are the alien Chinese wives and minor children of Chinese merchants domiciled and resident in the United States. The appellants arrived at San Francisco from China on July 11, 1924, seeking to join their respective husbands or fathers in this country. On arrival, they were taken into custody by the appellee, Commissioner of Immigration, and were ordered excluded, under the provisions of sections 5 and 13(c) of the Immigration Act of 1924 (Act of May 26, 1924, c. 190, 43 Stat. 153). The order of exclusion was affirmed on appeal by the Secretary of Labor, and was sustained in *habeas corpus* pro-

ceedings by the District Court for the Northern District of California. The opinion of the court is reported in 2 F. (2nd) 995 (first case).

An appeal was taken to the Circuit Court of Appeals; and that court has certified the following question for determination here:

> Are the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled within the United States prior to July 1st, 1924, such wives and minor children now applying for admission, mandatorily excluded from the United States under the provisions of the Immigration Act of 1924?

It should be noted that this case involves an altogether different question from that which is involved in the case of *Chang Chan et al.* v. *Nagle,* No. 770, at the present term. The two cases were decided at the same time by the District Court; and the two have come at the same time on certificate to this Court. The present case involves the right of *Chinese wives of alien Chinese merchants* to enter this country; while *Chang Chan* v. *Nagle,* No. 770, involves the right of *Chinese wives of citizens of the United States.* The two cases turn upon different points of statutory construction, based upon different provisions of the Immigration Act of 1924; and in addition, the present case involves a consideration of treaty rights, while No. 770 does not. For these reasons it is important that the two cases should be kept distinct.

STATUTES INVOLVED

In the present case, we are concerned with the following provisions of the Immigration Act of 1924 (Act of May 26, 1924, c. 190, 43 Stat. 153).

> SEC. 13(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3.

Of the exceptions above noted, only one is directly in point here. That is the exception provided by section 3(6):—

> SEC. 3. When used in this Act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except * * *.
>
> (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

A further provision of the Act must also be noticed:

> SEC. 5. When used in this Act the term "quota immigrant" means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act

> as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.

The Treaty with China of November 17, 1880 (22 Stat. 826, 827) provides:

> ARTICLE II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

It is conceded that this is a "present existing treaty of commerce and navigation," as contemplated by section 3(6) of the Immigration Act of 1924, *supra,* p. 3.

ARGUMENT

I

It will be observed that Article II of the Treaty of 1880, above quoted, speaks only of "Chinese merchants * * * *together with their body and household servants.*" No mention is made of their wives or minor children. Accordingly, for some

time, the lower Federal courts were in doubt as to the right of such wives and minor children to enter this country without the certificate required by section 6 of the Act of May 6, 1882, c. 126 (22 Stat. 58, 60), as amended by the Act of July 5, 1884, c. 220 (23 Stat. 115, 116).

The right of the wives and children to enter without certificates was upheld in the following cases:

In re Chung Toy Ho, 42 Fed. 398.
In re Lee Yee Sing, 85 Fed. 635.

The right was denied in the following cases:

In re Ah Quan, 21 Fed. 182.
Case of the Chinese Wife (*In re Ah Moy*), 21 Fed. 785.
In re Wo Tai Li, 48 Fed. 668.
In re Li Foon, 80 Fed. 881.

All doubts were set at rest, however, by the decision of this Court in *United States* v. *Mrs. Gue Lim,* 176 U. S. 459, in which it was held that the wife and minor children of a Chinese merchant domiciled in this country were entitled to enter and to join the head of their family without producing the required certificate. In this decision the Court construed the treaty as if it read:

> Chinese merchants, * * * together with their body and household servants [*wives and minor children*] * * * shall be allowed to go and come, etc.

The Court held that the wife and children partook of the status of the head of the family, and

were included in the spirit of the treaty, if not in its letter.

The question now before the Court is simply this: Has the decision in the *Gue Lim* case been affected by the enactment of sections 5, 13(c), and 3(6) of the Immigration Act of 1924, supra, pp. 3, 4? It is conceded that the appellants in this case would have had the right to enter this country, under the *Gue Lim* decision, prior to July 1, 1924, the date when the relevant sections of the Immigration Act of 1924 went into effect. It is suggested, however, that their right had been taken away by that Act, and that they must therefore be excluded.

At the outset it must be frankly explained that there is a difference of opinion between the two departments of the Government which are directly concerned with the administration of the Act. The Department of Labor is of opinion that the Act requires the exclusion of these appellants. The Department of State is of opinion that the Act and the Treaty together require their admission. The disagreement between the Departments thus focuses upon the extent to which treaty rights have been affected by the Act of 1924.

In view of the importance of this case, counsel for the Government feel it their duty to submit reasons in support of both opinions, in order that this Court may have the benefit of comparing them, and in order that it may not be compelled to

render a decision based upon a one-sided presentation of the case. Accordingly, in this brief is set forth the reasoning in support of the exclusion theory maintained by the Department of Labor. In the Appendix (*infra*, p. 13) are set forth the opposing arguments of the State Department, as embodied in a memorandum prepared by the Solicitor for that Department.

It must be added that the foregoing statement does not apply to the case of *Chang Chan* v. *Nagle*, No. 770, at the present term. That case, as has already been noted, turns upon a different point, and is treated in a separate brief.

II

It is conceded that the appellants in this case would formerly have been admissible under the *Gue Lim* decision. But we must now consider the effect of the Immigration Act of 1924, supra, pp. 3, 4.

The appellants are clearly "aliens ineligible to citizenship." They are therefore excluded by section 13(c) of the Act, unless they can establish their right to enter as "treaty merchants" under section 3(6).

Section 3(6) grants admission to "an alien entitled to enter the United States *solely to carry on trade* under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

Can it be said that the wife or the minor child of a merchant comes here "*solely to carry on trade*"? The agent of a merchant is not himself entitled to enter as a merchant. *Tulsidas* v. *Insular Collector*, 262 U. S. 258, 264. And this Court in the *Gue Lim* case did not hold that the wife of a merchant was entitled to enter "*solely to carry on trade.*" That case merely decided that she was entitled to enter solely to reside with her husband, as she then had the right to do. The purpose of section 3(6) was to take away that right by granting the right of entry only to actual merchants, and not, as formerly, to merchants and their families. Any other construction would deprive the section of its meaning. At the time when the *Gue Lim* decision was rendered, no statutory definition existed of the term "merchant"; and the Court accordingly construed the language of the treaty as including both merchants and their families. The Court might have decided the *Gue Lim* case differently had section 3(6) then been in existence.

An examination of the legislative history of section 3(6) is instructive. That section was inserted at the request of the Secretary of State, for the purpose of safeguarding treaty rights. But it must be noted that section 3(6) in its final form is very different from the provision which the Secretary originally suggested; and it is possible that the effect of the alteration is to exclude the wives and children of merchants.

The Committee Report states:

> The suggestions of Secretary Hughes for the protection of treaties of the United States with other countries have been met by the addition to section 3 of an additional exempted class, to wit:
>
> "(6) An alien entitled to enter the United States solely to carry on trade under and in pursuance of a present existing treaty of commerce and navigation."
>
> The original suggestion of Secretary Hughes was for an exemption in these words:
>
> "An alien entitled to enter the United States under the provisions of a treaty."
>
> Subsequently, the Secretary suggested the following words:
>
> "An alien entitled to enter the United States under the provisions of an existing treaty."
>
> The committee has incorporated in H. R. 7995 Secretary Hughes' proposal, but has used words which tie the exemptions to those persons properly exempted and entitled to enter the United States solely to carry on trade under and in pursuance of all existing treaties of commerce and navigation.—68th Congress, 1st Session, House Report No. 350, pp. 2–3.

Whatever might have been the result had Congress enacted, *totidem verbis,* either of the Secretary's suggestions, it is submitted that the case must be judged upon the law as it is written. The Committee Report indicates that Congress in-

tended to "tie the exemptions to those persons properly exempted *and entitled to enter the United States solely to carry on trade* under and in pursuance of all existing treaties of commerce and navigation." The effect of section 3(6), as actually passed by Congress, may be to deny the right of entry to all who do not come here "*solely to carry on trade.*" It is doubtful whether this phrase can include the wife or child of one who comes to trade.

III

In opposition to this view counsel cite the case of *Anderson* v. *Watt,* 138 U. S. 694, 706, and other cases holding that the domicil of the husband is the domicil of the wife, and that the identity of the wife is, in a sense, merged in that of the husband.

But has not this theory lost much of its force since the enactment of the Act of September 22, 1922, c. 411 (42 Stat. 1021), under which the citizenship of the wife no longer follows that of the husband? And the Immigration Acts often operate to prevent husband and wife from residing together in this country. Yet this Court, when appealed to on the ground of hardship, has declined to interfere.

Commissioner of Immigration v. *Gottlieb,* 265 U. S. 310.
Chung Fook v. *White,* 264 U. S. 443.
Yee Won v. *White,* 256 U. S. 399.

IV

In the next place, it should be noted that section 5 of the Act (*supra*, p. 3) provides that—

> An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant *by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.* (Italics ours.)

It was upon this section that the District Court based its decision in the present case, being of opinion that Congress had, by this section, manifested its intention to exclude all persons having the status of the appellants. It may well be that the appellants have no right of entry in and of themselves; their right of entry is dependent, not upon their own status, but upon that of their husbands or fathers. And if that is so, then they are excluded by the operation of section 5.

V

It should also be noted that Congress has been careful to grant admission to the families of Chinese government officials [section 3(1)], and to the families of Chinese clergymen or professors [section 4(d); section 13(c) (2)]; and from this fact it may be inferred that Congress did not intend to grant admission to the families of Chinese mer-

chants, according to the maxim *Expressio unius est exclusio alterius.*

Lapina v. *Williams,* 232 U. S. 78, 92.
United States v. *Goldenberg,* 168 U. S. 95, 103.

VI

It is conceded that a strong presumption exists in favor of maintaining treaty rights. While a later statute may repudiate treaty obligations, such repudiation is not to be presumed, especially where considerations of humanity are involved. The right of these appellants to enter this country is a right conferred, if not by the letter of the treaty, at least by the treaty as interpreted by this Court. But it is submitted that even treay rights can not prevail against the language of the Immigration Act of 1924. And under Sections 5 and 13(c) of that Act, it is doubtful whether these appellants can enter.

Such is the contention of the Department of Labor; but this Court should also consider the careful and well-reasoned opinion of the Solicitor for the Department of State, before answering the question.

JAMES M. BECK,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant to the Attorney General.

APRIL, 1925.

APPENDIX

MEMORANDUM OF THE VIEWS OF THE DEPARTMENT OF STATE ON THE QUESTIONS RAISED IN THE CASE OF CHEUNG SUM SHEE ET AL. v. NAGLE

WIVES AND MINOR CHILDREN OF ALIEN MERCHANTS ENGAGED IN INTERNATIONAL TRADE AND COMMERCE ARE BY THE TERMS OF THE TREATIES OF COMMERCE AND NAVIGATION ACCORDED A RIGHT TO ENTER THE UNITED STATES

Wives and minor children of alien merchants entering the United States for purposes of trade and commerce under a present existing treaty of the United States are themselves clothed with a treaty right to enter.

It may be noted in the first place that the courts of the United States, when interpreting the treaties of their country, act on the assumption that it was the design of the Contracting Parties not to contravene principles of morality and fairness;[1] that their agreement should be interpreted "in a spirit of *uberrima fides,* and in a manner to carry out its manifest purpose";[2] and that its terms should be liberally construed.[3]

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[1] *Ubeda* v. *Zialcita*, 226 U. S. 452, 454.

[2] Mr. Justice Brown, in *Tucker* v. *Alexandroff*, 183 U. S. 424, 437. "It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them." *Geofroy* v. *Riggs*, 133 U. S. 258, 271.

[3] Declared Mr. Justice Butler in the Opinion of the Court in *Asakura* v. *Seattle*, 265 U. S. 332, 342: "Treaties are to be construed in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Hauenstein* v. *Lynham*, 100 U. S. 483, 487; *Geofroy* v. *Riggs*, supra, 271; *Tucker* v. *Alexandroff*, 183 U. S. 424, 437."

40512—25——3

There is thus imputed the best of faith to the High Contracting Parties. This attitude of the courts gives recognition to the only intelligible theory on which enlightened states could be deemed to conclude treaties with each other. While it indicates no peculiar rule of construction, it establishes the plane from which problems of treaty interpretation must always be approached, and the spirit in which search for the ultimate fact—the actual design of the Contracting Parties—must be made.

The commercial treaties of the United States providing for the entrance and residence of nationals of one Contracting Party into the territories of the other for the purposes of trade have not made mention of the wives and minor children of such individuals. It seems to have been taken for granted that there is such unity of interest in the individual family that the head thereof, if given the right to enter a country for purposes of trade, is the representative of an entity embracing his wife and children who are not to be dissociated from him. This conclusion is fortified by the fact that treaties with Japan, China, and other countries contemplate prolonged and undetermined residence for the purposes of trade, the occupation of dwellings, and by necessary inference the establishment of homes.

In considering the various treaties of commerce and navigation which have been concluded by the United States with various foreign powers, it is necessary to note in the first place that, while there is considerable variation in the language employed, the general intent and purpose of all such treaties is the same. To illustrate, the Treaty of Friendship, Commerce and Navigation with the Argentine

Republic, signed July 27, 1853 (10 Stat. 1005, 1006), contains in Article II the following language:

> * * * The citizens of the two countries, respectively, shall have liberty, freely and securely, to come with their ships and cargoes to all places, ports, and rivers in the territories of either, to which other foreigners, or the ships or cargoes of any other foreign nation or State, are, or may be, permitted to come; to enter into the same, and to remain and reside in any part thereof, respectively; to hire and occupy houses and warehouses, for the purposes of their residence and commerce.

Article I of the Treaty of Commerce and Navigation with Belgium, signed March 8, 1875 (19 Stat. 628, 629), outlines the rights of the contracting parties "whether established or temporarily residing" in the territories of the other.

Article III of the Treaty of Peace, Friendship, Commerce and Navigation with Bolivia, signed May 13, 1858 (12 Stat. 1003, 1005), states that: "The citizens of either republic may * * * reside in all parts of the territory of either, and occupy dwellings and warehouses."

Article II of the Treaty of Friendship, Commerce and Navigation with Costa Rica, signed July 10, 1851 (10 Stat. 916, 917), provides that: "The subjects and citizens of the two countries, respectively, shall have liberty * * * to remain and reside." This last phrase is also used in Article I of the Convention of Commerce and Navigation with Great Britain, signed July 3, 1815 (8 Stat. 228), and in Article II of the Treaty of Friend-

ship, Commerce and Navigation with Honduras, signed July 4, 1864 (13 Stat. 699, 700). The words " sojourn and reside " are used in Article I of the Treaty of Commerce and Navigation with Italy, signed February 26, 1871 (17 Stat. 845, 846), and also in the Treaty of Commerce and Navigation with Norway-Sweden, signed July 4, 1827 (8 Stat. 346).

It would scarcely be suggested that each of these treaties should be interpreted differently in accordance with the exact words used. Such literal construction could not give effect to the intent of the contracting parties, nor could it avail to carry out the general purposes for which such treaties are concluded. It is believed that the varying terms of all these treaties may be properly paraphrased thus:

> The contracting parties agree that their citizens and subjects, respectively, shall have a right to come into the territories of the other for the purpose of carrying on international trade, and they are accorded the privilege of remaining indefinitely in the country, of establishing their homes and of bringing with them for this purpose the members of their families so long as they are here for that purpose.

The right of " treaty merchants " to bring with them their families follows as a necessary consequence upon their right to establish themselves in the country.

It may also be observed in this connection that although treaties are commonly referred to, as a matter of convenience, by so-called "titles," these " titles " are unofficial and can not be used as a

basis in classifying a particular convention as a "treaty of commerce and navigation" as that phrase is used in Section 3(6). Strictly speaking, a treaty has, as a rule, no legal "title," although some treaties contain in the preamble phrases descriptive of the treaties which might be regarded as legal titles or captions. Thus, the preamble to the treaty of February 21, 1911, with Japan (37 Stat. 1504), states that the United States and Japan "have resolved to conclude a Treaty of Commerce and Navigation," and the President's Proclamation of April 5, 1911, concerning this treaty (37 Stat. 1504) begins, "Whereas a Treaty of Commerce and Navigation." Although capital initials are used, these phrases may be regarded as descriptive merely. An examination of the original signed copy of the treaty of 1880 with China, in the archives of the Department of State, reveals that there is nothing therein which can be regarded as a title, although in Malloy's compilation (Vol. 1, p. 237) it is given the caption, "Immigration Treaty."

In so far as the Chinese treaty refers to merchants, and provides for their entry into the United States, it seems entirely reasonable and proper to consider it as a "treaty of commerce and navigation," because it may be taken to have been the design of the contracting parties that Chinese merchants should be permitted to enter as such for purposes of trade, just as merchants of other states have by treaty been given a similar right to enter the United States. There are also a number of treaties with Central and South American states which are called "Conventions for the Develop-

ment of Commerce by Facilitating the work of Traveling Salesmen." Such treaties accomplish a purpose similar to that of the general treaties called " treaties of commerce and navigation " and evidently come within the spirit of Section 3(6). The treaty of July 3, 1902, with Spain (33 Stat. 2105) is captioned " Treaty of Friendship and General Relations," but the language of Article II is not to be distinguished from that of many other commercial treaties. It would seem to be obviously improper to place dependence upon the unofficial captions of a compilation rather than upon the substance of the treaties themselves. It is only the latter consideration which can fairly meet the intent of the Immigration Act.

When the various treaties of commerce and navigation were concluded it was well known to the contracting states that requirements of traders and importers demanded the extended sojourn of nationals of one country in the territory of the other as a necessary incident of the business of firms engaged in international trade between the territories of the contracting parties. Corporations engaged in international trade usually require the presence of commercial representatives in another country for prolonged and indefinite periods. This feature of international trade is a common incident of our commerce with almost every foreign country. Definite restriction of it would menace the welfare of a trade which the United States is zealous to maintain; and the harm to it from the restriction applied to alien traders in our own country would be as vital as if the restriction were to be applied conversely to American representatives abroad.

It would be unreasonable to assume in the absence of convincing evidence that the United States and Japan, for example, sought, on the one hand, to give traders the right to enter, remain, and reside for an indefinite period for the purposes of trade, and, on the other, to isolate them while exercising that privilege from their wives and minor children.

An important social policy well recognized in the Anglo-American system lies at the foundation of this principle. Our courts have recognized the identity of interest which exists between husband and wife. The wife is an integral part of the husband's sphere of activity. In *Anderson* v. *Watt,* 138 U. S. 694, 706, the Supreme Court referred to previous decisions of the same tribunal and said as to husband and wife "the domicile of the husband is her domicile." This rule, the Court said, is "founded upon the theoretic identity of person, and of interest, between husband and wife, as established by law, and the presumption that, from the nature of that relation, the home of the one is that of the other, and intended to promote, strengthen and secure their interests in this relation, as it ordinarily exists, where union and harmony prevail." Therefore, because the family does exist as a single united entity, it may, in a broad sense, be said that the wife's purpose is the husband's purpose, and if the husband comes to the United States to carry on trade, his wife comes for that same purpose.

The Supreme Court of the United States in deciding the *Gue Lim* case[4] interpreted the treaty between the United States and China of November 17, 1880 (22 Stat. 826), in a manner that sustains

[4] *United States* v. *Mrs. Gue Lim,* 176 U. S. 459.

this conclusion. Mr. Justice Peckham, in the course of the opinion of the Court, said (176 U. S. 459, 466):

> And yet it is not possible to presume that the treaty, in omitting to name the wives of those who by the second article were entitled to admission, meant that they should be excluded. If not, then they would be entitled to admission because they were such wives, although not in terms mentioned in the treaty.[5]

Referring to prior conflicting decisions of the lower Federal Courts, Mr. Justice Peckham says further (p. 464):

> It is not necessary to review these cases in detail. It is sufficient to say that we agree with the reasoning contained in the opinion delivered by Judge Deady. *In re Chung Toy Ho,* 42 Fed. Rep. supra.

In that case Judge Deady said (42 Fed. 398, 399):

> It is impossible to believe that parties to this treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned, as entitled to such admission, is found in the fact that the domicile of the wife and children is that of the husband and father, and that the concession to

[5] It is not believed that the distinction drawn by Mr. Justice McReynolds in *Yee Won* v. *White*, 256 U. S. 399, with respect to *United States* v. *Mrs. Gue Lim*, 176 U. S. 459, has any bearing on the present discussion, or that the learned Justice sought to minimize the effect of the language quoted in the text above.

> the merchant of the right to enter the United States, and dwell therein at pleasure, fairly construed, does include his wife and minor children.[6]

In the case of *Ex Parte Goon Dip,* 1 F. (2nd) 811, arising under the Act of 1924, Judge Neterer, of the District Court of the Western District of Washington, N. D., held that the wife and minor son of a domiciled Chinese merchant were admissible under the provisions of Section 3 (6) of the Immigration Act of 1924, since by the Chinese treaty of November 17, 1880, such wife and child were accorded a right of entry. *U. S.* v. *Mrs. Gue Lim,* 176 U. S. 459, and *In re Chung Toy Ho,* 42 Fed. 398, are cited in support of this proposition.[7]

The same judge in *Ex Parte So Hakp Yon,* 1 F. (2nd) 814, held that the wife of a resident Japanese merchant was not admissible for the reason that the Japanese Treaty of 1911 did not give to such wives a right analogous to that conferred upon the wives of Chinese merchants by the Chinese Treaty of 1880. The attempted distinction is based upon the fact that the Chinese Treaty includes the words "merchants * * * together with their body and household servants," while the Japanese Treaty does not contain this exact language. The argument is that if servants were admitted, wives, though not expressly named, were also admitted *a fortiori.* This distinction between

[6] See also *Yee Won* v. *White,* 256 U. S. 399, 401. In *Woo Hoo* v. *White,* 243 Fed. 541, 543, the Circuit Court of Appeals for the Ninth Circuit said: "It is well settled that the terms of that treaty confer upon a Chinese merchant domiciled in this country the right to bring his wife and minor children into the United States."

[7] See also *In re Chin Hern Shu,* D. C. Mass., Dec. 11, 1924 (unreported).

the two treaties is believed to be unsound. The Supreme Court in the *Gue Lim* case does not rest its decision upon this language of the Chinese Treaty, but upon the theory of the identic domicile of husband and wife and the design of the contracting parties. As already pointed out, the design in concluding the various treaties of commerce and navigation is similar in all such treaties and contemplated that merchants should not be separated from their families. This is the fundamental purpose of all treaties of this description.

For these reasons it is believed to have been the design of the Contracting Parties in concluding the treaty of 1880 and other commercial treaties, to permit traders to whom was given the right to enter and reside, the right to bring with them their wives and children; or, to express it differently, such individuals and their wives and children have a treaty right to enter and reside as a necessary incident to the trade which the treaty contemplates.

THE MEANING OF SECTION 3 (6)

Before attempting to construe the language of the Act it is necessary to emphasize the well-established rule of construction, which has been frequently enunciated by the Supreme Court, that it is never to be supposed that an Act of Congress overrides the provisions of a treaty unless its words are so clear that there is no escape from that conclusion. Declared Mr. Justice Harlan in the opinion of the Court in *Chew Heong* v. *United States,* 112 U. S. 536, 539, 540:

> * * * The court should be slow to assume that Congress intended to violate the stipulations of a treaty so recently made with

> the government of another country * * *. Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and the people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a coordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.[8]

The Immigration Act of 1924 must therefore be approached with this principle in mind. Only the clearest and most explicit language would warrant imputing to Congress an intent to violate our treaties, i. e., an intent to exclude the wives and minor children of "treaty merchants." On the other hand, a weighty presumption is thrown into the scales in favor of a construction which respects our treaties.

Passing, then, to a consideration of the terms of the Immigration Act of 1924, it is noted that Sec-

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[8] The foregoing statement was quoted by Mr. Justice Peckham in the opinion of the Court in *United States* v. *Mrs. Gue Lim*, 176 U. S. 459, 465, where it was said: "It is impossible to entertain the belief that the Congress of the United States, immediately after the conclusion of a treaty between this country and the Chinese Empire, would, while assuming to carry out its provisions, pass an act which violated or unreasonably obstructed the obligation of any provision of the treaty."

See also *Ex Parte Webb*, 225 U. S. 663, 683; *United States* v. *Lee Yen Tai*, 185 U. S. 213, 221; *Devlin on the Treaty Power*, Section 176.

tion 3(6) of the Act classifies as a nonimmigrant "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of Commerce and Navigation." Section 13(c) provides that "no alien ineligible to citizenship shall be admitted to the United States unless such alien * * * is not an immigrant as defined in Section 3."

If we assume that aside from the Act wives and minor children of merchants are given by the treaty a right to enter the United States, it is obvious that no argument for their exclusion under the act could arise except for the words "solely to carry on trade," which appear in Section 3(6). The argument is made that since wives and minor children do not carry on trade, they are not nonimmigrants and are excluded by force of the provisions of Section 13(c). It is argued that this phrase in Section 3(6) was directed against the wives and children of merchants, on the ground that any other construction deprives this phrase of all meaning. However, such is not the case.

It is common knowledge that when the then proposed Immigration Act was before the House Committee on Immigration, Secretary Hughes wrote to Representative Johnson, Chairman of that Committee, on February 8, 1924 [Cong. Rec., vol. 65, part 6, p. 5810], stating *inter alia* that he did not believe that the present subdivision (2) of Section 3 of the then proposed Act providing for the temporary admission of aliens for business or pleasure fully met our treaty obligations. It is also common knowledge that the debates in Congress upon the rights of aliens under existing treaties centered around the treaties relating to Japanese,

and particularly to the so-called Gentleman's Agreement. The debates further disclose that Senator Shortridge, who proposed and sponsored the amendment which is now Section 3(6) of the Act, was emphatic in asserting that his proposed amendment preserved to Japanese all rights which they had under the treaty of 1911. But he also indicated that it was not proposed to recognize the Gentleman's Agreement, the terms of which had not been disclosed to the Senate and which they feared allowed more extensive entry of Japanese than they desired to concede.

In this connection attention is called to the following quotations from the debates in the Senate when the present subdivision (6) of Section 3 was being discussed. It will be noted that the remarks quoted are those of the late Senator Colt, Chairman of the Senate Immigration Committee, and of Senator Shortridge, proposer of an Amendment putting the treaty exemption into the form which it now has.

[Congressional Record, 68th Congress, 1st Session, Vol. 65, Part 6]

Page 5416.

> Mr. COLT. If you will dwell on what is held to be an "immigrant," I think it will help you. I have already said that *under the trade treaties relating to commerce those who come over as traders are not "immigrants." The gentlemen's agreement relates to laborers, and hence to immigrants.* The Secretary of State objected, so far as the House bill is concerned, first, upon the ground that it violated the treaty, because it only admitted aliens here temporarily, and therefore was not broad enough to cover

traders, and, secondly, that it violates the gentlemen's agreement. Thereupon the House in their amended bill, among the excepted classes, excepted those coming in under present treaties. *Now, mind you, the treaty class are not strictly immigrants, and therefore a mere phrase* excepting those coming in under a treaty would cover the treaty with Japan, but would not cover the gentlemen's agreement.

* * * * *

Mr. SHORTRIDGE. Mr. President, begging the indulgence of the Senator from Rhode Island for a moment, before we turn from the subject, I wish not to be misunderstood. I have made the statement, and I venture to repeat it, that the amended bill of the House does meet the objection that the contemplated exclusion of aliens ineligible to citizenship violates an existing treaty. I state that not idly or impulsively, but deliberately. It meets that objection; *all those who are admissible into this country under any existing treaty of commerce and navigation are to be admitted under this act. But it is also true that there is a so-called gentleman's agreement, which never was a treaty, is not a treaty, and which has failed of its purpose.*

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Page 6304.

Mr. BAYARD. *The amendment which the Senator now offers to the pending bill will operate to prevent the continuance of that gentlemen's agreement?*

Mr. SHORTRIDGE. *It will have that effect.*

Mr. BAYARD. That is the opinion of the Senator?

Mr. SHORTRIDGE. Yes.

Mr. BAYARD. And it is for that purpose that it is put in?

Mr. SHORTRIDGE. Yes. *The proposed committee amendment to the Senate bill seeks to perpetuate this agreement. The House bill has already eliminated it utterly. I propose that the Senate shall do likewise.* [Italics ours.]

* * * * *

It is therefore believed that the phraseology of Section 3(6) was adopted with a desire to grant full rights to persons entitled to enter under treaties of commerce and navigation. As has already been demonstrated, wives and children have such a right of entry. In other words, this phraseology was adopted to show that the treaty provisions referred to were only those provisions respecting privileges of commerce and navigation, and that the class of persons referred to was the merchant class within the scope of those provisions.

There is another apparent reason for the use of the phrase " solely to carry on trade " as used in Section 3(6). The various treaties of commerce and navigation do not refer exclusively to merchants. A right of entry is also accorded to ships (and necessarily to their crews) and to temporary visitors. For example, the Treaty of Peace, Friendship, Commerce, and Navigation with Bolivia, signed May 13, 1858 (12 Stat. 1003, 1005), provides in Article III that " The citizens of either republic may frequent with their vessels all the coast, ports, and places of the other, where foreign commerce is permitted " and " shall also have the

unrestrained right to travel in any part of the possessions of the other." Article I of the Treaty of 1911 with Japan (37 Stat. 1504), also grants liberty of "travel," as does Article I of the Convention of October 14, 1881, with Serbia (22 Stat. 963). The Convention of November 25, 1850 with Switzerland (11 Stat. 587, 588) grants liberty to "come, go, sojourn temporarily." Congress had already provided for alien seamen in Section 19 of the Act and for visitors or travelers in Section 3(2) thereof. As already noted above, it was originally believed by the framers of the bill that Section 3(2) sufficiently covered those entitled to enter under the treaties until Secretary Hughes indicated his contrary opinion in his letter of February 8, 1924, to Representative Johnson. It seems that Congress was intent on putting in a new provision to cover merchants, and it was with this in view that they inserted the phrase "solely to carry on trade" under the treaties. In other words, the phrasing of Section 3(6) seems to have been adopted partly to avoid a conflict with or repetition of Sections 3(2) and 19, and was designedly supplemental thereto.

That Congress did not intend to exclude wives and children of merchants who themselves had a right under the treaties to enter the United States is amply shown by the remarks of Senator Shortridge in supporting his amendment (the present Section 3 (6)) on the floor of the Senate.

In this connection it may first be noted that where the words of an Act are ambiguous, the Supreme Court will be aided in seeking the intent of Congress, not, it is true, from the merely general debates, but from the statements of those who

framed or introduced the legislation and from Committee reports. In *Caminetti* v. *U. S.* (1917), 242 U. S. 470, 490, the Supreme Court said: "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation." In *Duplex Printing Press Company* v. *Deering* (1921), 254 U. S. 443, 474, the court rejected the debates but said: "Reports of committees * * * stand upon a more solid footing and may be regarded as an exposition of the legislative intent * * * and this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage." See also *Wisconsin R. R. Commission* v. *C., B. and Q. R. R.* (1922), 257 U. S. 563. The remarks of Senator Shortridge, as the member who introduced and sponsored this part of the Act, are believed to be entitled to be received as evidence of the intent of Congress in regard to this provision. His statements explaining the purpose of his amendment are therefore quoted here:

[Congressional Record. 68th Congress, 1st session, Vol. 65, Part 6]

Page 5416.

Mr. SHORTRIDGE. I answer the Senator that it is not my purpose, it is not the purpose of anyone in sympathy with me, to violate any existing treaty; wherefore—

* * *.

Mr. ROBINSON. Let us get right down to this. Does the Senator mean to say that if his amendments are violative of a treaty with Japan, or would have the effect of abro-

gating it, he would not propose the amendments, but would withdraw them?

Mr. SHORTRIDGE. I answer thus: I can imagine a situation where we would be justified in legislating as we did in respect to the treaty with China. The Congress of the United States passed an exclusion law aimed at that country, full, direct, in the face of a then-existing treaty. I do not offer that as a worthy precedent to be followed, but in this case I have taken the trouble to say that we have sought to avoid that entirely.

Mr. ROBINSON. I understand that very well. You would much rather not abrogate the treaty.

Mr. SHORTRIDGE. Certainly not.

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Page 5743.

Mr. SHORTRIDGE. What Secretary Hughes feared was lest by this legislation we offend against existing treaties. We have avoided that altogether in the bill.

Page 5744.

Mr. SHORTRIDGE. * * * I think, as I said the other day, that the Secretary of State will now see clearly that we do not propose in this bill in anywise to modify, annul, or disregard the provisions of the treaty of 1911.

* * * * *

Mr. SHORTRIDGE. By the amendment which we put in, in addition to all who may come in under the treaty of 1911—and there is no

limit to the number who may come pursuant to the provisions of that treaty.

* * * * *

Mr. McKellar. *The Senator says that students and ministers of the Japanese church and traders may come and may stay ad libitum. Do I understand there is no limit put upon those three classes at all, and their families? Would not that let in a very large body of men and women?*

Mr. Reed of Pennsylvania. If it would be of any assistance to the Senator, I have the language of the treaty here. It is quoted by Secretary Hughes in his letter.

Mr. Shortridge. I should be glad to quote the words of the treaty. *Undoubtedly there is no limit as to the number of those admissible under that treaty.* That was one of the reasons why former President Roosevelt was so indignant over that treaty of 1911, as I will point out in a moment. There is no limit set as to the number. * * *

Page 5745.

Mr. Shortridge. Yes; I will put them into the Record. I suggest to the Senate that there is presented a situation which is charged with unrest, with friction, and with danger. Our Secretary of State in the performance of his duty, of course, was particularly concerned with this legislation. As the bill was first introduced in the other House—I beg Senators to note this, if they will—it did not contain the present provision covered by *my amendment, which respects fully and unequivocally the treaty of*

1911, so that neither Japan nor China nor Siam nor any of the nations of the earth can object to our action if we adopt this measure upon any suggestion that it is violative of any treaty of commerce and navigation.

Page 5746.

Mr. SHORTRIDGE. The first objection is advanced more by our own people than by them. It is said that we violate the treaty obligations of this Republic. So, *once for all, that the most stupid or perverse-minded man elsewhere may understand it—every Senator understands now that we do not, but in order that the most stupid or perverse-minded man elsewhere may understand it—let me say that we have proposed specifically to recognize the existing treaty of commerce and navigation with Japan. Whatever rights are guaranteed to Japan under that treaty are to remain.* We are not disposed to question the terms of the treaty. There it is. This Nation has set its hand to it. There is the treaty, and there let it be, and let it be observed. *So let us have done with puerile discussion elsewhere that we propose to trample upon an American treaty. Far from it. We lift it up; we stand by it; and we are only anxious that Japan shall stand by it and observe it.* * * *

Page 6304.

Mr. SHORTRIDGE. * * * To remove any doubt which may be in the mind of a thoughtful Senator *I repeat again and yet again that*

it is not the purpose of the House bill, it is not the purpose of the proposed amendment, it is not my purpose, and it is not the purpose of any of those who favor this exclusion policy to violate in any degree any such existing treaty. I may observe that that treaty admits an unknown number for the purposes specifically in the treaty set out. So that—and this question has been put to me by other thoughtful Senators—it should be understood by us, of course, and once and for all, that *there is no disposition to violate any existing treaty such as is described in the House bill or in the proposed amendment.* [Italics ours.]

This same desire and intent to uphold our treaty obligations are also amply proved by the following quotations from pages 2, 3, and 4 of the Report of the House Committee on Immigration, accompanying the introduction of the "Johnson Bill," H. R. 7995.

[Report No. 350, H. R., 68th Congress, 1st session. March 24, 1924]

Protection of Treaties.—The suggestions of Secretary Hughes for the protection of treaties of the United States with other countries have been met by the addition to section 3 (p. 5) of an additional exempted class, to wit:

"(6) An alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

The original suggestion of Secretary Hughes was for an exemption in these words:

"An alien entitled to enter the United States under the provisions of a treaty."

Subsequently, the Secretary suggested the following words:

"An alien entitled to enter the United States under the provisions of an existing treaty."

The Committee has incorporated in H. R. 7995 Secretary Hughes's proposal, but has used words which tie the exemptions to those persons properly exempted and entitled to enter the United States solely to carry on trade under and in pursuance of all existing treaties of commerce and navigation.

The committee agrees with Secretary Hughes that immigration and the regulation thereof is a domestic matter.

The control of immigration belongs to the Congress of the United States. Your committee feels that this additional exemption does not pass that control from Congress, and feels also that it is broad enough to take care of all of the clauses of all our commercial treaties, including that with Japan, which has been specifically mentioned in the exchange of letters between the State Department and the committee.

The Secretary of State, by the very nature of his office, must guard our treaties with other nations. In fairness, the Secretary of State must present the views of other countries to the committees of Congress which have to do with the framing of legislation which may affect other nations or the relations of the United States with other nations.

> The House Committee on Immigration in turn has felt obliged to go just as far as it could in an effort to meet the views of Secretary Hughes with reference to treaties in connection with the effort to accomplish a restriction of immigration.
>
> * * * * *
>
> The committee believes that the exemption of those entitled to enter under treaty provisions, and the exemption of "aliens visiting the United States as tourists or temporarily for business or pleasure" fully satisfies treaty requirements.

Having established that the various treaties of commerce and navigation confer upon the wives and minor children of merchants engaged in international trade and commerce, a right to enter the United States with their husbands and fathers, and having shown that this right was recognized and preserved by Section 3(6) of the Immigration Act of 1924, it is proper to consider the reasoning of those who are inclined toward a contrary construction of the statute and treaties.

POSITION OF THE DEPARTMENT OF LABOR

The contentions of the Department of Labor are set out in Acting Secretary White's letter of October 24, 1924, to the Secretary of State. He bases his interpretation on two portions of the Immigration Act of 1924. First, he says:

> I am not, however, convinced that the conclusions reached in your letter have given sufficient effect to the language of clause 6 of Section 3 of the Immigration Act of 1924,

> which appears to me to cover not every alien who is entitled to enter under the treaty of commerce and navigation, but only such of those aliens as enter solely to carry on trade under and in pursuance of the provisions of such a treaty, which can not be truly said of the wife and minor children coming merely as such with the husband and father, although he himself may be entering for that purpose.

This is nothing short of a blunt assertion that Congress undertook to cut off rights conferred by treaty. Unless such an imputation is supported by evidence, it should not be treated seriously, for it contradicts the sound canon of construction above noted whereby the Supreme Court always presumes that Congress has no design to violate an existing treaty of the United States. Moreover, in the present case, this contention is valueless, because the evidence is convincing that Congress did in fact, after discussion of the matter, endeavor to respect the treaty obligations of the nation.

Second, he says:

> I am also not convinced that sufficient effect has been given to Section 5 of that Act, which appears to me to declare so definitely that no alien shall be admitted as a nonimmigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other regulation or law forbidding immigration that I feel there is no room left for construction.

The gist of this contention is that wives and children of merchants not being admissible in their own right, are expressly excluded by Section 5, which provides "an alien who is not particularly specified in this Act as a * * * nonimmigrant shall not be admitted as a * * * nonimmigrant by reason of relationship to any individual who is so specified."

The answer to this contention depends upon two things: first, the meaning of the appropriate treaty provisions; and second, the meaning of Section 3(6). If the treaty gives the wives and children of merchants a right to enter the United States, and if Section 3(6) stipulates that anyone having a right under the treaties is a nonimmigrant, then it may be said that wives and children are so particularly specified in that Section. These points have, it is believed, already been established above, but it is pertinent to note that the phrase "particularly specified," as used in Section 5, is necessarily an expression of greater generality than the words themselves would imply. If we turn to Section 3(6) we find that it says merely "*an alien* entitled to enter," etc. No particular persons are specified. The Section does not include the words "a merchant" or "a business man" or "an alien man" or similar specific designations. It merely says "an alien." The other qualifying words have been discussed above and it has been shown that they do not limit the class included in this provision to the merchants themselves. The persons "particularly specified" in Section 3(6) are "aliens" who are entitled to enter for commercial purposes under the treaties. "An alien" may be a man, woman, or minor child, and any one of these

may therefore be said to be "particularly specified."

If wives and children of merchants enter by virtue of a right granted by the treaty, Section 5 is not applicable, because Section 5 refers to persons whose sole claim to a right of entry is based on relationship. It has no reference to persons whose treaty right is expressly recognized by the terms of some section of the Act, and therefore has no reference to these wives and children whose right of entry—as has been demonstrated—is recognized by Section 3(6).

POSITION OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SECOND DIVISION, IN DECIDING THE PRESENT CASE

The basis for the Court's decision is to be found in 2 F. (2nd) 995, at page 997.

The Court says:

> As already pointed out, the treaty of 1880, while permitting "teachers, students, [and] merchants together with their body and household servants" to enter, does not in terms permit their wives and children to do so, and their entry has been so far sanctioned by virtue of their relationship to a member of one of those classes. The present act designates such merchants as nonimmigrants, and the provision alluded to, to the effect that an alien who is not particularly specified in the act as a nonimmigrant shall not be admitted as such by reason of relationship to any individual who is so specified, seems to me to be directly pointed at persons in the situation of these petitioners.

While it is not wholly clear what the Court had in mind, an analysis of the judicial reasoning is unnecessary, because the Court has evidently failed to grasp the essential points which must be borne in mind in interpreting the Act. The Court does not consider the treaty itself and consequently can not authoritatively conclude whether there is a conflict between the treaty and the statute. If such a conflict exists or if it is suspected, it is the primary duty of the Court to see whether the two can be reconciled. To fail in this duty is to assume that Congress intended to violate the treaty, whereas, as has been noted, the Supreme Court has repeatedly stated the principle that the presumption is in favor of the treaty and emphatically in its favor. But here there is no conflict; the treaty gives a right and the statute recognizes and confirms the right.

It is believed that the Court could not have reasoned as it did if it had grasped the significance of the Supreme Court's interpretation of the Chinese treaty in the *Gue Lim* case. The Supreme Court did not inject the wives and children of merchants into the treaty; it found that these persons were already within the treaty. Once the treaty has been authoritatively interpreted—that is, when it is known what the treaty means, what is its scope, what persons are included within its terms—this question is settled. It is no longer pertinent to inquire what reasoning was employed by the Supreme Court in reaching its decision. The element of relationship was, of course, considered by the Supreme Court in deciding what the treaty meant—for what purposes the contracting parties concluded such a convention. But relationship was merely an element of interpretation and not

the basis of the right. The contracting parties conferred the right by concluding a treaty which permitted an international merchant to reside indefinitely in this country *with his family.* When the question first arose, the meaning of the treaty was not apparent. The Supreme Court interpreted the treaty and found that the contracting parties had given to the wives and children, as well as to the merchants themselves, a right to enter and reside. It is no longer necessary to ask why the wives and children are in the treaty; it is necessary only to realize that they are within its scope. Although this point has already been discussed in this memorandum, it may be useful to repeat that Section 3(6), under a proper interpretation, is seen to specify that wives and children of merchants are nonimmigrants. They are nonimmigrants because Congress intended by this subdivision to classify as such "any alien" who, in the interests of international trade, had, under our treaties of commerce and navigation, a right to enter. Since such wives and children were given that right by treaty they are included within the provisions of Section 3(6), and therefore Section 5 is inapplicable by its very terms, since it refers only to aliens not particularly specified in the Act.

It may be noted that the Court, unlike the Department of Labor, does not discuss the wording of Section 3(6) in this connection, but on the contrary says in another place [2 F. (2nd) 995, 997]:

> It is admitted by the respondent that it [the rule laid down in *United States* v. *Mrs. Gue Lim,* 176 U. S. 459, admitting wives and children under the old Act] would be appli-

> cable in this case were it not that the Immigration Act of 1924 contains provisions which effectually preclude its further observance, *namely, Section 5 and subdivision (c) of Section 13 thereof.* [Italics ours.]

The question then resolves itself into the inquiry whether these persons have a right under the treaty. An affirmative answer to this inquiry has already been made.

SUMMARY

By way of summary, the following points are emphasized:

First. For reasons which are hereinabove set forth, and which have had the support of the Supreme Court of the United States, the wives and minor children of alien merchants entering the United States for purposes of trade and commerce under a present existing treaty of the United States are themselves clothed with a treaty right to enter.

Second. If such wives and minor children are clothed with a treaty right to enter, it must be presumed that Congress had no desire to impair that right.

Third. The evidence is abundant and convincing that Congress itself not only had no desire to curtail that treaty right, but also deliberately undertook to respect the treaty right to enter of all who were clothed therewith.

Fourth. Inasmuch as the wives and minor children of alien merchants possess by treaty a right to enter, they fall within the reasonable scope of Section 3 (6) of the Act, and consequently remain unaffected by any provisions of Section 5 thereof.

CONCLUSION

In conclusion, emphasis must again be laid on the seriousness of the situation which would develop, if, in addition to the restrictions upon immigration which Congress had the right to impose, it should be found that Congress by its legislation had violated a treaty right heretofore sustained by the Supreme Court of the United States to the prejudice of the rights of foreign traders and of the interests of our own commerce. It is earnestly urged that there is no provision of the Act which compels us to face such a situation.

CHARLES CHENEY HYDE,
Solicitor for the Department of State.

FEBRUARY 18, 1925.

Approved by the Secretary of State, February 19, 1925.